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IN THE

Supreme Court of the United States.

FROM THE SUPREME COURT OF IOWA.

CHARLES P. COOK *et al.*

No. 93.

vs.

COUNTY OF MARSHALL, STATE OF IOWA.

ROBERT E. HODGE *et al.*

No. 150.

vs.

MUSCATINE COUNTY, STATE OF IOWA, *et al.*

BRIEF FOR PLAINTIFFS IN ERROR.

JUNIUS PARKER,
Attorney.

W. W. FULLER,
FRANK S. DUNSHEE,
JUNIUS PARKER,
Counsel.

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In the Supreme Court of the United States.

CHARLES P. COOK *et al.* vs. COUNTY OF MARSHALL, STATE OF IOWA.	No. 98.

ROBERT E. HODGE *et al.* vs. MUSCATINE COUNTY, STATE OF IOWA, *et al.*	No. 150.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of the Case.

These cases are here by writ of error from the Supreme Court of Iowa. They have to do with the validity and effect of the same statute of the State of Iowa, and, by stipulation of counsel and order of the Court, are heard as one case. For brevity and convenience the first-mentioned case will be referred to herein as the Marshall County case, and the second-mentioned case as the Muscatine County case.

The Marshall County case went to the Supreme Court of Iowa on appeal from the District Court of Marshall County, and the Muscatine County case from the District Court of Muscatine County, Iowa. In each of these cases the plaintiffs in error filed petitions to be released and relieved from a cigarette mulct tax, as it is familiarly known to the Courts of Iowa. The party dealing in

cigarettes and liable personally to the tax, and the owner of the real estate upon which the tax becomes a lien, brought these petitions and are the plaintiffs in error here. Upon the filing of the petitions and amendments to petitions, which amendments were filed by leave of Court, the respective defendants in the court below demurred to such petitions on the ground that they did not state a cause of action. These demurrers were sustained, appeals taken to the Supreme Court of the State of Iowa, where the judgments of the lower court were affirmed, and the cases are brought regularly to this Court on writ of error from the Supreme Court of the State of Iowa.

The tax from which plaintiffs in error sought remission is a tax of $300 per year levied in accordance with a statute of Iowa collated as Section 5007 of the Code of Iowa, which statute is as follows:

> "There shall be assessed a tax of $300 per annum against every person, partnership or corporation, and upon the real property and the owner thereof within or whereon any cigarettes, cigarette paper or cigarette wrapper, or any paper made or prepared for use in making cigarettes, or for the purpose of being filled with tobacco for smoking, are sold or given away or kept with intent to be sold or given away, under any pretext whatever. Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected aad distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property, both personal and real, used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes or cigarette paper, or selling, bartering or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside the State."

Defendants in error by their petitions, contentions in the Supreme Court of Iowa, and assignments of error in this Court, have contended that the foregoing statute is

invalid because in contravention of the Constitution of the United States under whatsoever facts such statute may be invoked or sought to be applied, and that it is further in violation of the Constitution of the United States when a tax is sought to be levied upon plaintiffs in error, because so applied such statute is a regulation of and interference with interstate commerce.

Statement of Facts.

These cases were decided, as heretofore stated, on demurrers to the petitions, and there is therefore no contention as to the facts. The plaintiff in error Cook, in the Marshall County case, had a retail cigar and tobacco store, which he leased from the plaintiff in error Plunkett. The plaintiff in error Hodge, in the Muscatine County case, conducted a retail cigar and tobacco store, which he rented from the plaintiff in error Mrs. J. Tabor. Each of these retail tobacco dealers ordered cigarettes from manufacturers, residents of States other than Iowa, which manufacturers had no place of business within the State of Iowa. These cigarettes were delivered to the respective plaintiffs in error by a common carrier, to wit, an express company, which brought them from without the State of Iowa directly to the place of business of the respective plaintiffs in error, in small sealed packages containing ten cigarettes each (the record inadvertently says *blank* cigarettes each, but as shown by the opinion of the Supreme Court of Iowa in the Marshall County case, a part of the record, it is conceded that the packages contained only ten cigarettes each). Each of the retail tobacco dealers sold only the packages of cigarettes so delivered to them respectively. There appears nothing in the record to indicate the means used or method employed by the express company, the common carrier, in transporting these cigarettes from the factory of the manufacturer outside the State of Iowa to the place of business of the retail dealer within the State of Iowa. The only thing that does appear is that the packages sold by them were the identical packages received by them from such common carrier.

Contentions of Plaintiffs in Error.

Upon the case hereinbefore stated and the facts hereinbefore set out, the plaintiffs in error in the Marshall County case and the plaintiffs in error in the Muscatine County case contended in the lower court and in the Supreme Court of Iowa and by assignments of error contend in this court:

FIRST.—That the statute under which the said tax was levied, so far as it was sought to be applied to the sale of cigarettes made by said plaintiffs in error, is void, because in contravention of Section 8 of Article I. of the Constitution of the United States, which section provides that Congress shall regulate commerce among the States. Plaintiffs in error contend that the packages of cigarettes sold were imports, and that by no act or change of condition had such packages lost their character as imports, and that therefore an attempt to forbid or regulate their sale, by the Legislature of the State of Iowa, is an invalid attempt to exercise by such Legislature a prerogative belonging exclusively to Congress.

SECOND.—That the said statute under which the tax as aforesaid was levied is in violation of the Fourteenth Amendment to the Constitution of the United States, in that it denies the plaintiffs in error the equal protection of the laws, plaintiffs in error being persons within the jurisdiction of the State of Iowa.

THIRD.—Beside these contentions, the plaintiffs in error in the Muscatine County case contended in the lower court and in the Supreme Court of Iowa, and contend by assignments of error in this court, that the statute under which said tax was levied is in violation of the Fourteenth Amendment to the Constitution of the United States in that it operates to deprive plaintiffs in error of their property without due process of law.

FOURTH.—Plaintiffs in error in the Marshall County case desire to take advantage of said contention marked "*Third*," if the record is in such condition under the rules

of the Court that they can do so, and they contend that under said rules the record is in such condition.

Argument in support of contentions of plaintiffs in error.

Interstate Commerce—Original Package.

In 1900 this Court decided a case (*Austin* v. *Tennessee*, *170 U. S., 343*), which in its facts closely resembles this case, so far as this branch of the discussion is concerned. This case, however, and the contentions of plaintiffs in error herein, do not involve an application for a rehearing of the *Austin* case. The difference between this case and the *Austin* case is small, but a consideration of the prevailing opinion, the dissenting opinion and the concurring opinion in the *Austin* case shows that the distinctions and peculiarities in the *Austin* case that induced the decision and judgment rendered in that case were themselves small. In the *Austin* case it appeared that the cigarettes sold by the dealer were in packages of ten; that they were sealed with an internal revenue stamp; and that in their individual physical condition and size such packages were the counterparts of the packages sold by the plaintiffs in error in this case. It appeared, however, in the *Austin* case that for purposes of transportation these packages of cigarettes were by the express company gathered together and placed in a basket (it did not appear whose property the basket was) and in this basket were conveyed clean to the place of business of the retail merchant in Tennessee, and were there dumped from the basket on to the counter or floor of the retail store. In the case at present under consideration, it does not appear what means were adopted by the express company for its convenience in transportation—so far as appears, and therefore presumably, these packages were carried as any other express packages are carried, to wit, on the floor or in permanently attached receptacles of the express car—these packages were simply packages originally delivered to the express company outside the State of Iowa by the manufac-

turer of the cigarettes, and delivered by the express company to the dealer within the State of Iowa. Presumably during the whole time of transit they were carried by the express company as any other express packages would be carried. It would be idle to contend that this difference is one of great magnitude or seeming legal significance, but under the facts even in the *Austin* case the decision of this Court hung in the balance; it is significant in considering the distinctions between this case and the *Austin* case that in the *Austin* case four members of the Court agreed on a prevailing opinion, four members of the Court agreed on a dissenting opinion that dissented from the entire opinion and judgment of the Court, and the conclusion reached in the prevailing opinion became the conclusion and judgment of the Court only by virtue of the concurring opinion of one member of the Court, which concurring opinion contained these words:

> "Was each particular parcel of cigarettes an original package within the constitutional import of those words as defined by the previous adjudication of the Court? I am constrained to conclude that this question is correctly answered in the negative, not only from the size of each particular parcel, but from all the other surrounding facts and circumstances, among which may be mentioned the trifling value of each parcel, the absence of an address on each, *and the fact that many parcels for the purpose of commercial shipment were aggregated, thrown into and carried into an open basket. Thus associated in their shipment, they could not under all the facts and circumstances of the case, after arrival be segregated so as to cause each to become an original package.*"
>
> *Austin* v. *Tenn.*, 179 U. S., 343–364.

In the prevailing opinion in the *Austin* case it is said that the case there under consideration is the first one presenting distinctly the question whether in holding that the State cannot probibit the sale in its original package

of an article brought from another State, the size of the package is material. It may be fairly said that the case at bar is the first case presenting distinctly and unequivocally to this Court the question whether the *size of the package is controlling*, and whether the smallness of a package in a case which has none of the surrounding facts and circumstances to which the separate concurring opinion in the *Austin* case refers, is to operate to deprive such package of the immunity from State regulation with respect to its sale that such package would unquestionably have, under the Constitution of the United States as declared and enforced by numerous adjudications of this Court, if it were larger.

Plaintiffs in error do not use this case as a petition to rehear the *Austin* case, but they earnestly urge that there be no extension of the principles announced in the *Austin* case, and that, on the contrary, there be put a narrow limit to the authority of that case. To that end, while they despair of adding to the force of the legal argument advanced in the dissenting opinion in the *Austin* case, they do desire to call to the attention of the Court, in connection with the legal contentions and precedents there made and cited, facts with respect to trade in cigarettes and the laws regulating such trade, which, when brought to the attention of the Court, the Court will take judicial notice of.

(*a.*) It cannot now be contended that the immunity given to original packages, or rather to sellers of original packages, from interference or regulation by State legislation is to wholesalers of such packages who sell to retailers, and not to retailers of such packages who sell directly to consumers. It would, indeed, be strange if such a distinction had ever been made by this Court. The whole discussion which is involved in this matter of "original package" has arisen from and turns upon the following question: "At what time do goods that have been articles of interstate commerce cease to be articles of interstate commerce and become as other property in a given State?" The difference between a wholesaler and a retailer is a personal difference, depending on the

amount of goods they sell, and the *status* of such goods certainly cannot be determined, influenced or colored by the quality, character or *status* of the person in whose custody they are. So long as the *status* and condition of goods that have been articles of interstate commerce are such that they may still be called such articles of interstate commerce, they are within the domain of congressional regulation as to their carriage and disposition, and when this *status* has been subject to change, the law ceases to regard them as articles of interstate commerce, and thereafter treats them just as it would like goods produced in a given State and never the subject of interstate commerce; therefore, in this changed *status* and condition they are no longer subject to the authority of Congress, but may be regulated as to their holding, carriage and disposition by the Legislature of the State in which they are situate.

In view of this, it is not strange that this Court has held that "the right of the importer to sell does not de-
" pend upon whether the original package is suitable for
" retail trade or not, but is the same whether to con-
" sumers or to wholesale dealers, provided he sells in
" original packages." In the case from which this citation is made, one of the two contentions of the defendant, who insisted against the immunity of the original package from State regulation was that "If the right of citizens of
" another State to send oleomargarine into the Common-
" wealth of Pennsylvania be admitted, it can only be in-
" troduced in original packages suitable for wholesale
" trade; and where the article imported is intended and
" used for the supply of the retail trade or is sold by retail
" directly to the consumer, the package in which it is
" imported from another State is not an original package
" within the protection of the interstate commerce pro-
" vision of the Constitution of the United States." It was in reply to and denial of the soundness of such contention that the Court used the language quoted, and while two members of the Court dissented from the prevailing opinion, it does not appear that there was any dissent from so much of the prevailing opinion as concerned the point now under discussion.

Schollenberger v. *Penn.*, 171 U. S., 1.

(*b.*) If the test, as intimated in the prevailing opinion in the *Austin* case, and also as intimated in the opinion of the Supreme Court of Iowa in the Marshall County case, is to be the *ordinary* package of shipment, and the position of the Court is to be that immunity will be given to the *ordinary* package of shipment, and such package be considered an "original package," and that no immunity shall be given to an *extraordinarily* sized package, and such extraordinarily sized package shall not be regarded as an "original package," Courts will be involved in a maze of inquiry arising out of each individual case. Nothing better illustrates this than the condition of the cigarette trade. Cigarettes of a cheaper kind and of a brand that are well established are ordered in large quantities, and are ordinarlly shipped in such large quantities to wholesalers who distribute them among retailers; being staple and being called for in large quantities, the manufacturers take advantage of the cheaper carriage charges that are consequent upon shipments in large quantities as compared with shipments in small quantities. Cigarettes that are of higher price, and whose demand is not so large, are shipped in small quantities, but still to wholesalers, because while all the retailers in a given community do not desire them, a number do so desire them, and such number is large enough to make their distribution through jobbing channels profitable; but the *ordinary* original package of these higher priced and less popular cigarettes is a very different thing from the *ordinary* original package of the cheaper and more staple and popular brands. Cigarettes of still higher price are not sold to jobbers at all, but are shipped directly, and by a high-price carrier, usually an express company, to a retailer here and there who, because of his high-class trade or because of the better profits in their distribution, desires them, and an *ordinary* original package of these cigarettes would be smaller still. Finally, there are manufacturers of cigarettes, as well as of cigars, who advertise a direct connection between manufacturer and consumer, and solicit orders from consumers themselves, making their advertisements more attractive to the ex-

clusive smoker by the offer to mark the cigarettes or cigars with a particular and private mark for each particular consumer. The *ordinary* original package with respect to such last named cigarettes is frequently, at least as to introductory orders, of the exact dimensions as is the original package in the case at bar. It would be a singular and anomalous condition of Constitutional Law if a new and unpopular brand of cigarettes might be sold in a given package containing a given number of cigarettes, as an original package, when the old, established, and popular brand of cigarettes packed in the same way and in the same size package could not be so sold, for the reason that because of its greater popularity it was ordinarily shipped in a larger package. The real question, without respect to whether the package be a package of popular cigarettes or whether it be a package of unpopular cigarettes, is whether the *status* of the package and its contents is such that the authority of Congress extends to it as an article of interstate commerce, or the authority of the State Legislature extends to it as an article that has ceased to be an article of interstate commerce. It would seem to plaintiffs in error as illogical under the existing conditions of the cigarette trade to make this question depend upon whether the package was that *ordinarily* used by the consignor when he came to make a shipment, as was the unsuccessful contention in the *Schollenberger* case that this status and line of demarcation between national control on the one hand and state control on the other depended upon the character of the importer and whether he was a wholesale or retail dealer.

The trade conditions mentioned are so generally and well established that they are of the class of facts of which the Court will take judicial notice (*Austin* v. *Tenn.*, *supra*), but plaintiffs in error apprehend that such trade conditions and the singular effects that might follow the making of this question whether the package was an ordinary or not an ordinary package of importation controlling in determining the limitations of national and State authority have not been brought sharply to the attention of this Court.

(c.) Closely connected with what has been said in opinions referred to as to the immunity of the *ordinary* original package of importation from State regulation, and the non-immunity of *extraordinary* original packages of importation from State regulation, has been in the discussion of the motives of the shipper. The manufacturer of cigarettes has been sometimes criticized, if not denounced, because he has attempted to evade a State statute. It is undoubtedly true that the manufacturer of cigarettes in the case at bar intended and hoped that the consignee of these cigarettes would be able to sell them without making himself liable to State regulation. Can any one suppose that the party, manufacturer or otherwise, who shipped oleomargarine into Pennsylvania (*Schollenberger* v. *Penn.*, *supra*), or that the brewer or distiller who shipped liquors into Iowa (*Leisy* v. *Hardin*, *135 U. S.*, *100*) did not intend and hope for the same immunity? Money invested in United States bonds is not taxable by State authorities, primarily because the courts have held that to tax such bonds is unconstitutional; if a man taking the trouble to bring his wealth into such non-taxable shape and paying the premium therefor, so puts his money beyond the power of the State to tax, is he to be denounced for evading the law? The sale of cigarettes is not *malum in se*—it is merely *malum prohibitum*—and prohibited by statutes in only two States in the United States, Tennessee and Iowa. By virtue of the operation of the Constitution of the United States this statute of Iowa is as absolutely inoperative when sought to be applied to cigarettes so long as they continue under the control of Congressional regulation, as it would be when sought to be applied to sales of cigarettes in Illinois or Nebraska. When a town with power to do so passes an ordinance prohibiting the sale of liquor, and the keeper of the bar-room located within that town removes beyond the corporate limits and by right of license conferred upon him by a higher law—the State statute—opens a bar-room, his old trade may follow him, and his action may to an extent nullify the purpose of the town council that passed the prohibitory statute, and his action in going beyond the corporate limits may be denounced as an evasion

of the ordinance;—but on that account shall the ordinance be given an extraterritorial effect? The boundaries between the authority of Congress and the authority of the State under the Interstate Commerce Clause of the United States Constitution, though not so easily defined as are territorial boundaries, being defined, should be just as fixed, just as definite, and just as immovable from consideration of the purposes and intentions of the parties as territorial boundaries.

Under all the adjudications of this Court, including *Austin* v. *Tenn.*, *supra*; *Brown* v. *Md.*, *12 Wheat.*, *419*; *Bowman* v. *R. R. Co.*, *135 U. S.*, *465*; *Leisy* v. *Hardin*, *135 U. S.*, *100*; *Vance* v. *Vandercook*, *170 U. S.*, *438*; *Rhodes* v. *Iowa*, *170 U. S.*, *412*, and *Schollenberger* v. *Penn.*, *171 U. S.*, *1*, cigarettes that are manufactured without the State of Iowa are from the time they are put in transit until the importer in Iowa breaks the original package, or after he has himself disposed of such original package, under the exclusive regulation of Congress. This power of regulation includes the power to absolutely prohibit this interstate traffic in them (*Lottery case*, 188 U. S., p. 321). While this *status* continues and this authority of Congress may be exercised, the Legislature of Iowa is as utterly powerless to regulate such transit and first disposition—if made before breaking of original package—as it would be powerless to regulate affairs in Illinois or Nebraska, or any other adjacent or non-adjacent State.

(*d.*) The dissenting opinion in the Austin case suggests a hypothetical case, a consideration of which is interesting in this connection: Suppose Congress should take affirmative action and by statute declare that interstate commerce in cigarettes should be only in the original stamped packages, and—as it now provides that there shall not be attached to any stamped package anything that covers the internal revenue stamp—should provide that there should not be put around or upon the internal revenue stamp anything that covered it, but that cigarettes should be only shipped in such prescribed packages, separated from each other and subject to the easy inspection

of the internal revenue officer, but that when so shipped they might be transported into a State without being subject to any State regulation and, being in such prescribed original package, might be sold by the importer without being subject to any State regulation. Would such congressional enactment be valid, or void? There would in such case be no question as to whether the importer was a wholesaler or retailer; no question as to whether the package was an ordinary package or not, because all packages would be of the size prescribed; and no question as to the intention of the manufacturer to evade the law, because his method of shipment would be the only method that he could adopt and to obey the law of Congress. Under the cases cited from *Brown* v. *Maryland*, *supra*, down to this day the sale in the original package by the importer of an article is as much a part of interstate commerce as is its transportation. And so if the other parts of the hypothetical statute would be valid and within the power of Congress, that part which declared that the article when brought within a State in the prescribed form might be sold without respect to State regulation would be valid. Can there be any question that under the decisions of this Court running down to the *Lottery Case* (*188 U. S., 321*) the whole act would be sustained as a constitutional exercise by Congress of its authority to regulate interstate commerce?

> "We should hesitate long before adjudging that an evil (the lottery) of such appalling character carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end *because Congress alone has the power to occupy by legislation the whole field of interstate commerce.*"
>
> *Lottery Case*, *supra*, p. 358.

> "The principles announced in *Gibbons* v. *Ogden*, were reaffirmed in *Brown* v. *Maryland* (12 Wheat., 419–446), after expressing doubt whether any of the evils proceeding from the feebleness of the Federal Government contributed more to the establishing

> of the present constitutional system than the deep and general conviction that commerce ought to be regulated by Congress, Chief Justice Marshall, speaking for the Court, said: 'It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States.' Considering the question as to the just extent of the power to regulate commerce with foreign nations and among the several States, the court reaffirmed the doctrine that the power was 'complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution' * * * *"
>
> *Lottery Case, supra*, p. 348.

And yet the status, condition and method of shipment of the package in the case at bar have been identically the same as would have appeared in the hypothetical case just put. The packages were in fact packages put up in exact accordance with the laws of Congress; they were certainly original packages, and there was no interposition of any basket or other containing vessel. Congress has not by statute spoken and said that commerce in cigarettes shall be free; it has not said that the importer who receives them from without the State may sell them in the original package in which he received them, and shall not be forbidden or regulated in such act by State legislation, but by this silence it has under the decisions of this Court said just those things as emphatically and authoritatively as it could do even by the passage of the most solemn statute.

> "It is also certain that the settled doctrine is that the power to ship merchandise from one State into another carries with it as an incident the right in the receiver of the goods to sell them in the original packages, any State regulation to the contrary notwithstanding; that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution until by a sale in the original package they have

been mingled with the general mass of property in the State."

Vance v. *Vandercook*, *170 U. S.*, *438*, *444*.

"Another established doctrine of this Court is that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will with the subject shall be left free from any restrictions or impositions."

Robbins v. *Shelby Taxing Dist.*, *120 U. S.*, *489*, *493*.

"Whenever, however, a particular power of the general Government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled."

Leisy v. *Hardin*, *135 U. S.*, *100*, *109*.

(*e.*) Since the adjudications of this Court have well settled the principle of the immunity of the original package and goods contained in it from the regulation of State laws, and have well settled that this immunity from State regulation extends to the sale by the importer of such original package of goods, provided that such goods are in fact articles of commerce, it would seem useless to enter into any discussion of the policy or impolicy, the wisdom

or unwisdom, from the standpoint of the statesman, of this constitutional principle first announced by Chief Justice Marshall in *Brown* v. *Maryland* (12 Wheat., 419). Plaintiffs in error believe, though, that the limitation on the doctrine of the protection of the original package announced in the *Austin* case, if such limitation is confirmed and extended by affirming the judgment of the Supreme Court of Iowa in the case at bar, will have a tendency to nullify this doctrine of the freedom of interstate commerce, and tend to make untrue the words of Mr. Justice Bradley in *Stockton* v. *R. R.* (33 Fed., 9): "In matters of foreign and interstate commerce there are no States." It will be noted that the opinion of the Supreme Court of Iowa in the record in the Marshall County case speaks with some disdain of the proposition, considered as an original proposition, that a commodity may be introduced into a State in the original package in which manufactured and there sold by the importer in such original package, although there is a State law forbidding the sale of such commodity. The language of the Supreme Court of Iowa in this respect is in part as follows: "As an original proposition addressed "to common sense, aided by a conscience of average en- "lightenment and uncomplicated by precedent, there "would seem to be no room for doubt that this question "(whether there is protection for the original package) "should be answered in the negative. * * * The ex- "treme and unreasonable extension of the principle "affirmed in *Brown* v. *Maryland*, has been the fruitful "source of much annoyance and embarrassment in many "of the States of the Union." Now, with due deference for the Supreme Court of Iowa, it is contended that as an original proposition uncomplicated by precedent, the principle announced in *Brown* v. *Md.* (*supra*), and extended logically in *Bowman* v. *Railway* (*supra*), *Leisy v. Hardin* (*supra*), *Vance* v. *Vandercook* (*supra*), *Schollenberger* v *Penn.* (*supra*) is an entirely sound principle; that it has been a source of strength to the Union and its commerce, instead of an embarrassment to the States; and that the unimpaired perpetuation and enforcement of the doctrine is essential to the maintenance of a National

Commerce; that the breaking down of the doctrine by courts is fraught with great danger and that when occasions arise, not for a departure from the great cases mentioned, but for a change of conditions so as to give to the States a control in a limited way of this national subject, such change can be better made by Congressional action than by any recession by this Court from the doctrine announced and enforced by it.

So far as cigarettes are concerned, it is very evident that there is no great popular demand for the regulation of their sale by States, and if cigarettes were the only article of commerce there would be small practical danger in abrogating the principle of exclusive national control over the objects of commerce and the carrying of such national control up to the point of a sale by an importer in the original package. Up to the decision of this Court of the Austin case in November, 1900, in 1893 U. S. District Judge Hanford had declared the internal revenue package of ten cigarettes when it was in fact the original package of importation, entitled to the immunity from State regulation (*Washington* v. *Coovert*, unreported, but see 164 U. S., 702, where the State, being appellant, the appeal was dismissed). In 1895 U. S. Circuit Judge Goff decided exactly the same question in exactly the same way (*In re Minor*, 69 Fed., 233). In 1896 U. S. Circuit Judge Sanborn made an exactly similar decision (*McGregor* case, 76 Fed., 956); and in 1897 U. S. Circuit Judge Lurton agreed with the other three distinguished judges mentioned. In this condition, Legislatures might very well have thought that it would be impossible to prohibit the sale of cigarettes by dealers who imported them and then sold them in the original packages in which imported. But in 1900, this Court in the *Austin* case declared that when these packages were shipped in a basket at least, they were no longer original packages and therefore entitled to no immunity, and yet from the date of that decision until now, no State has seen fit to pass a statute forbidding the sale of cigarettes—the statutes in Iowa were passed long before the decision by this Court of the Austin case.

The danger to the commerce of the country from the

narrowing or abrogation of the doctrine of the immunity of the original package from State regulation, and the further doctrine that a sale of such original package by the importer is an act of interstate commerce, lies in the variety of objects that may be brought within the police power of the State. The Legislature that concludes that the sale of cigarettes should be prohibited need go but a little further to conclude that the sale of tobacco should be prohibited, and but a little further still to say that the sale of coffee is injurious to the citizens and should not be allowed. Not only does the police power of the State extend over matters connected with the health of the community, but it extends also over matters connected with their general prosperity and welfare (*Tiedeman on Police Power, p. 2*). It is not unfair to say that the Pennsylvania law directed against oleomargarine, which was considered and condemned by the Court when applied to oleomargarine imported from other States and sold in the original package of importation (*Schollenberger* case, *supra*), was induced not so much by a desire to serve the health of the community as a desire to protect the owners of cows. The danger and the seriousness of the matter has been considered by this Court:

> "Can it be supposed that by omitting any express declaration on the subject Congress has intended to submit to the several States the decision of the question in each locality of what shall and what shall not be articles of traffic in the interstate commerce of the country. If so, it is left to each State, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured or sold in any State and sought to be introduced as an article of commerce into any other. If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort or peace of the

community. This policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming in competition with those which it seeks to protect. The police power of the State would extend to such cases as well as to those in which it was sought to legislate in behalf of the health, peace and morals of the people."

Bowman v. *R. R.*, *supra*, p. 493.

On the other hand, what menace or embarrassment is there in the upholding in its completeness of the doctrine finally announced in *Leisy* v. *Hardin* (*supra*), and never in the slightest limited or curtailed until the decision in the *Austin* case. We of the United States are one people. Articles good for the mass, articles recognized in our general commerce, are not very bad for the residents of any particular State. If a thing is bad and generally bad, Congress can prohibit interstate commerce in it, and the States can prohibit intrastate commerce in it, as has been done in the case of lottery tickets (*Lottery case*, *supra*). If there is a commodity whose evil effects are so pronounced that Congress concludes that, while interstate traffic in it should not be absolutely prohibited, the people in the various States should be left to prohibit it or not as they choose, Congress can as to such article abdicate its exclusive power and authority over interstate commerce in favor of the States, as it has done in the case of liquor, and such action is valid and effective (*In re Rahrer*, *140 U. S.*, *545*). Until Congress so prohibits absolutely, or leaves it to the States to prohibit, it is better that the States be embarrassed in their attempts to enforce peculiar notions, than that the commerce of the country be involved in the confusion that might result from giving to States a right to declare what shall and what shall not be articles of commerce:

"The wisdom and the discretion of Congress, their identity with the people, and the influence

> which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."
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> *Gibbons* v. *Ogden*, 9 Wheat., 190 (quoted with approval in *Lottery Case, supra*, 363).

In the foregoing discussion, no argument has been attempted on the proposition that cigarettes are articles of commerce, because by unanimous opinion of the Court that proposition was established in the Austin case. No distinction has been attempted either between this Iowa statute which levies a mulct tax, and what the statute would have been if it has been absolutely prohibitive; this tax is not levied on imported cigarettes, and even considered as a tax statute the case would not be controlled by the principles so recently announced by the Court in *Am. Steel & Wire Co.* v. *Speed*, 192 U. S., 500. As a matter of fact, however, as construed by the Supreme Court of Iowa itself it is not a taxing statute at all, but is a criminal statute. It has not been deemed necessary either to discuss other matters and precedents fully discussed and unanimously agreed upon in the *Austin* case.

Denial of the equal protection of the laws.

In both the Marshall County and the Muscatine County case it was contended in all the courts below, and is contended by assignments of error in this Court, that the statute under which tax in these cases is sought to be levied and collected, is invalid because in contravention of the Constitution of the United States, in that it denies persons within the State the equal protection of the laws. The statute in question contains as its last sentence the following exception: "But the provisions of this section shall "not apply to the sales by jobbers and wholesalers in "doing an interstate business with customers outside the

"State." The effect of the section and its proviso is that notwithstanding the stringent provisions of the body of the section, which operates to levy a penalty on any one, wholesaler, retailer or other person who sells cigarettes or keeps them with the intent that they should be sold or given away under any pretext whatever, a particular class, to wit, jobbers and wholesalers, may keep them with intent that they be sold, if they are to be sold in doing an interstate business with customers outside the State. The retailer may have customers outside the State as well as the jobber or wholesaler, but he is forbidden to supply such customers.

The point of this contention of plaintiffs in error is that this statute with its proviso and exception has made a classification, which classification is entirely arbitrary and not justified by the circumstances, and not founded on reason, and therefore that it is an unequal law and invalid. Since the Fourteenth Amendment was adopted, there have been very many decisions in this Court and in other courts as to what constitutes a denial of the equal protection of the laws, and the attempt has always been made to sustain such laws on the contention that the Legislature had the right to make a classification and make the law apply only to a particular class. It might and would be desirable to prolong the discussion of this point, except for the fact that so recently this Court has thoroughly and authoritatively discussed the whole subject and reviewed all of the authorities. Of course, reference is made to *Connolly* v. *Union Sewer Pipe Co.* (*184 U. S., 540*), where the Anti Trust statute of Illinois was declared unconstitutional because of its proviso that its provision should not apply to agricultural products or live stock while in the hands of the producer or raiser. In the course of the elaborate prevailing opinion in that case the Court, among other things particularly applicable to the case at bar, said:

> "The State has undoubtedly the power of appropriate legislation to protect the public morals, the public health and the public safety, but if, by their

necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, that must be deemed unconstitutional and void."

"The difficulty is not met by saying that generally speaking the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations in order to subserve public objects. For this Court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

"Looking then at all the sections together, we must hold that the Legislature would not have entered upon or continued the policy indicated by the statute unless agriculturists and livestock dealers were excluded from its operation and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section."

In the great case from which these quotations are made, it might have been contended, and doubtless was, that there was a reason for the classification, and that it was not absolutely arbitrary, because the public interest could suffer but little, if at all, from combinations among the original producers of livestock or agricultural products, just as it may be contended in the case at bar that the public interest may suffer but litttle from the sale by wholesalers and jobbers in their interstate trade. But the Court in the *Connolly* case refused to be misled by this question of degree of harm, and held that there was no reasonable justification for the classification, and that the whole statute must therefore fall.

Taking the definition as given in the Standard Dictionary as correct, the Legislature of Iowa in giving the exemption to jobbers *and* wholesalers acted advisedly, for the two terms are not synonymous. A jobber is "one "who buys goods in the bulk from the importer or manu- "facturer, and sells to the retailer," but a wholesaler is simply "a dealer in large quantities," and may sell to consumers as well as to retailers. This definition of "wholesaler" is not scholastic, but is well recognized in the trade—large consumers buy from "wholesalers" habitually all sorts of articles, and thus secure a lower price, and when one seeks to make a purchase from a "wholesaler" he is not asked whether he will consume or sell to consumers the goods so purchased; the question is only as to the quantity he will purchase. So we have a privilege given to the large dealer which is denied the small, and it is to traffic in an article that the Legislature of Iowa conceives to be hurtful to the public health or morals. The reasonableness of this classification reminds one of the reasonableness of the rule that a large package of an article deemed by a State Legislature to be harmful to the public health or morals, may have the immunity of an original package, while a small package is denied such immunity. If the classification in this statute is to be upheld as reasonable, and if it is believed that dealing in cigarettes is harmful to the public health or morals, we have the singular condition that the greater the extent of the injury the less the crime.

It has not been usual for Legislatures to except from the operation of a statute the large dealer or producer and leave under its condemnation the small; the tendency has been just otherwise, and the Court considered this opposite tendency in the case of *Cotting* v. *Stockyards Co.* (*183 U. S., 79, 112*), where, with the concurrence of the whole Court, Mr. Justice Brewer said:

> "There can be no pretense that a stockyard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra two head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a State may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guarantee of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made."

Just how considerable and significant would be the privilege given to all dealers in Iowa, irrespective of magnitude of dealing, to sell to their customers in interstate business, it seems to plaintiffs in error is not material. Iowa has, perhaps more than any other State, border towns, each of which has a corresponding town outside of the State just across the border. It was undoubtedly to protect the merchants in such border towns in their competition with merchants of Illinois, Nebraska, Missouri and Minnesota for the trade both of retail merchants and consumers in these respective States, that this proviso was enacted. The merchant who sells in large quantities in Davenport, Clinton, Sioux City and Council Bluff, is free to supply his trade with cigarettes, but the merchant in these same

cities whose sales are not in sufficiently large quantities to bring him in the class denominated as "wholesalers," is forbidden.

Taking of property without due process of law.

As will be observed in the opinion of the Supreme Court of Iowa appearing in the record in the Marshall County case, plaintiff in error in that case contended that this statute is invalid because the Constitution of Iowa forbids putting anything into a statute that is not indicated by its title, and the contention of plaintiffs in error was that this section, levying a tax on cigarette dealers, had been passed only under the title, "An Act to Revise, Amend "and Codify the Laws Relating to Crimes and Their "Punishments," and that the section involved here was therefore invalid. The Supreme Court of Iowa denied that contention, and in the course of its opinion said:

> "Bear in mind that this statute as a whole is an attempt to restate not only the law defining crimes and misdemeanors, but the remedies to be applied for suppressing and punishing the same. It certainly was competent for the Legislature under the head to designate those acts which, in its wisdom, should be forbidden as against public policy, and to include therein the traffic in cigarettes. The authorities to this effect are too numerous and familiar to require citation. In codifying these statutes the Legislature found already upon the statute book the prohibition now carried into Section 5006, and in carrying it into the Code amended it by adding thereto Section 5007, providing for the mulct. That it was intended as an aid in suppressing and punishing violations of the provisions of the preceding section seems too clear for controversy. While called a 'tax' it is a 'mulct' tax, and a mulct is a fine imposed for an offense, a penalty."

In this condition of the Marshall County case, and after the Supreme Court of Iowa had taken this view of the statute in question, the plaintiffs in error in the Musca-

tine County case, which involved the same statute, set up the contention in the courts below that the statute as thus construed operated to take property without due process of law, and such contention was made in the Supreme Court of Iowa, and was indeed the only question discussed in the opinion of that Court as shown by the record in the Muscatine County case. This contention has not been heretofore made in the Marshall County case, for the reasons indicated, but plaintiffs in error in the Marshall County case desire now to make such contention, and believe that upon the condition of this record and the authorities, they are entitled so to do, although now is the first time that they have made it.

If a question is one as to foundation of right, it may be decisive in the Supreme Court of the United States, though not pressed, and, indeed, though waived, in the lower Court.

> *Mining Co.* v. *Societe des Mines*, 164 U. S., 261, 265.

> "Where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a State statute is drawn in question, and the decision is in favor of its validity, this Court has repeatedly held that if the federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here."
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> *Water Power Co.* v. *St. Ry. Co.*, 172 U. S., 475, 488.

This last cited case contains a thorough discussion by Mr. Justice Brown, concurred in by the whole Court, of the matter of not having raised federal questions below, and the effect upon such condition of Section 709 of the Revised Statutes. In this opinion there is drawn a distinction between cases in which there is in question the validity of a statute on the ground of its being repugnant to the Constitution of the United States, and cases where

right, privilege or immunity is claimed under the Constitution or a statute of the United States. In the latter class of cases such right or immunity must be distinctly set up in the Court below, and not being set up will be conclusively presumed to be waived, but in the first class of cases the rule requiring that the invalidity of the statute and the distinct ground for such invalidity shall be set up in the Court below is less rigorously enforced.

The citation of other authorities is needless after their full review in the case last cited, but it would seem to plaintiffs in error that this Court, having certainly obtained jurisdiction of the Marshall County case by the undoubted federal question involved in the attack on the validity of the statute in question, because it denies equal protection of the laws, and because as applied to the facts in the case it amounts to an attempt to regulate interstate commerce, will examine the statute in all its aspects to determine whether it is in conformity with the Constitution of the United States and therefore valid, or whether it is in conflict with some clause of the United States Constitution and is therefore no law. The question might be different if this Court was considering whether it would assume jurisdiction of the case, but having such jurisdiction, the failure of the Court to consider this alleged unconstitutionality of the statute in question, because it deprives plaintiffs in error of property without due process of law, in the Marshall County case, while the point is certainly distinctly and sufficiently raised in the Muscatine County case, might lead to the very singular situation and result that the plaintiffs in error in the Marshall County case would be subject to the penalty of a statute which in the same decision of this Court in support of the contention of the Muscatine County plaintiffs in error, is held absolutely void.

On account of the foregoing considerations, it seems to plaintiffs in error that they and all of them are entitled to have the judgment of this Court on the question now under discussion, but the plaintiffs in error in the Muscatine County case are certainly entitled to have such judgment.

Just as there have been many judicial opinions on that section of the Fourteenth Amendment which forbids the

denial of equal protection of the laws, so there has been much discussion of the equally important section of the Fourteenth Amendment which forbids the taking of life, liberty or property without due process of law, and no single opinion of the Court, much less brief and argument in a case, can be hoped to review in any thorough way these authorities. Mr. William D. Guthrie, in his lectures on the Fourteenth Amendment (p. 70) quotes as perhaps the most frequently quoted definition of "due process of law," the definition given by Mr. Webster in his argument in the Dartmouth College case, of "law of the land: "By the law of the land is most clearly intended the "general law; a law which hears before it condemns; "which proceeds upon inquiry and renders judgment "only after trial. The meaning is that every citizen "shall hold his life, liberty, property and immunities "under the protection of the general law which governs "society. Every law which may pass under the form "of an enactment is not therefore to be considered the "law of the land." It is undoubtedly true that the necessities and inconveniences of the case have induced courts, and this Court, to resolve doubts in favor of the validity of taxing laws, in cases where, if the subject had been other than taxation, such laws would likely not have been upheld. Many of these authorities are cited in the opinion of the Supreme Court of Iowa in the record in the Muscatine County case. The general rule is well established that taxing statutes will not be held to have the effect of depriving one of property without due process of law, if they provide for the imposition of taxes on property in general with reasonable and fixed times for applications for reduction of assessments, &c., although the owner of the property taxed has no actual notice of the amount of assessment and such other matters.

But plaintiffs in error contend that even if Section 5007 should be considered a tax law and not a criminal statute the procedure involved in it and in the liquor mulct tax law to which it refers is not due process of law, in that it makes provision for fixing a lien and a personal judgment upon the owner of real estate without any sort of notice, actual or constructive, to such owner that his real estate

is becoming subject to a lien, and he subject to personal judgment. The cigarette mulct tax provides that it shall be levied, collected and distributed in the same way as the liquor mulct tax, and reference must therefore be made to the liquor mulct tax law contained in the Code of Iowa of 1897 at Secs. 2432 *et seq.* The Supreme Court of Iowa has held, and plaintiffs in error are concluded by such holding, that Sections 2441 and 2442 of the Code of Iowa of 1897, with respect to applications for remission of the liquor mulct tax law, are applicable, and that under them applications may be made for remission of the cigarette mulct tax. These sections provide, in short, that at the meeting of the Board of Supervisors of the county next following the listing, application may be made to remit the tax by a petition filed with the County Auditor at least eight days before the time for the consideration of the case, and that on the application to remit the owner of the property may be heard in support of the same, and that evidence of the general reputation of the place will be admissible. This listing is made on the last day of December, March, June and September in each year (*Code of Iowa, Sec. 2437*), and the meetings of the boards of supervisors are held on the first Mondays, in January, April, June and September, of each year (*Code of Iowa, Sec. 412*). Without considering the matter of the eight days' notice, we have the fact that an application for remission of a tax levied on the last day of December must be made on the first Monday of January, which may be the following day but one, and the party who fails to make such application at that time is under the statute estopped from making it thereafter. No provision, however, is made for notice, even to the tenant who is alleged to have sold the cigarettes, and no provision is made for notice to the owner of the property at all. The payment of the tax cannot be enforced until one month after it has become delinquent, and its payment may be enforced even when delinquent at the option of the treasurer (*Code of Iowa, Sec. 2440*). It is perfectly true that notice of the imposition of a license tax or special assessment does not have to be given, and it may be admitted that no notice would be required to be given to the dealer, the tenant, who sold

cigarettes (*McMillan* v. *Anderson*, 95 U. S., 37), but the petition in the Muscatine County case of the plaintiff in error, who was the owner of the real estate, illustrates the viciousness of the statute in that it provides for no notice whatsoever to the owner of the real estate. This plaintiff in error did not sell cigarettes, and did not authorize any one else to sell cigarettes, and in her petition, the demurrer to which was sustained, she states that she had no knowledge whatever that cigarettes or cigarette paper were being sold on her premises, and never consented to the same, and in fact put a stop to the sale of cigarettes as soon as it was brought to her attention. Notwithstanding all this, her property and herself have been subject to a judgment for the amount of the quarter's tax, and it may be collected by the treasurer as well from her property and herself as from the dealer. The owner of property knows that in the nature of things his property is subject to be assessed for general taxes, and is liable also to be specially assessed for local improvement, and if he is given reasonable opportunity to be heard as so value, then due process of law is not denied him. Those who engage in a profession or trade know that in the nature of things there may be license taxes imposed upon them, and they cannot claim that due process of law is denied them, although no actual notice is given them, if they have an opportunity along with others to appear and protest. The law on this subject is well expressed in one of the leading cases on this subject: *Hagar* v. *Reclamation District* (*111 U. S., 701, 709*):

> "Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things, or persons, or occupations. In such case the Legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the

delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel or a restaurant, or selling liquors, or cigars, or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the State, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it. But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially, and in most of the States provision is made for the correction of errors comi mitted by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."

The selling of cigarettes was made a crime in Iowa by Section 5006 of the Code, which is a simple criminal statute. A party who leases real estate for general mercantile purposes has no reason to assume that it would be used in committing the crime forbidden by Section 5006 of the Criminal Code of Iowa. Without notice or knowledge that such was being done, the owner of the real estate is subjected to the deprivation of her property, and it is no defense to her under this statute to say that she had no knowledge and gave no consent to the illegal practice. The only question that can be raised in her favor is that her tenant did not sell the cigarettes, and even upon this question evidence of general reputation is admissible against her. A statute that provides for such a proceeding and which not only may, but in the Muscatine County case does lead to this result, may constitute and provide for due process of law, but if it does then all significance in the guarantee of this is lost.

This question has been considered as if the statute were an ordinary tax statute. It is in fact not such, but, in the language of the Supreme Court of Iowa, while it provides for a tax, the tax is a "mulct" tax, and the passage of the statute was merely meant to put more easily collected, if not heavier, penalties on the sale of cigarettes (see opinion of the Supreme Court of Iowa in the record in the Marshall County case). We have, then, looking only at the position of owners of real estate, a statute, the effect of which is to penalize such owner because of the criminal act committed on his premises, in the commission of which criminal act such owner had no hand at all, and of which he had no notice. It is as if by statute of the United States the owner of premises in which counterfeiting is committed should become subject to a penalty and fine, which penalty and fine would be remitted not upon his showing that he had no knowledge of and had not participated in such counterfeiting, but upon his showing that the tenant of the building had not in fact been guilty of counterfeiting on the premises. The Supreme Court of Mississippi considered a question very similar to that here

involved in *McBride* v. *State* (*70 Miss., 516*), in which there was before the Court a statute of Mississippi which provided that any person unlawfully selling liquors or permitting them to be sold at his place of business, should pay the city, town or village where the offense was committed the sum of $500, and that the Sheriff or State Revenue Agent could assess and collect such penalties by distress. The similarity, not to say identity, of this statute with the section under consideration by the Supreme Court of Iowa in the Marshall County case, is striking. Selling liquor in a certain manner was already unlawful under the statute of Mississippi, just as selling cigarettes under any circumstances was already unlawful under the statutes of Iowa. The State was under some difficulty, perhaps, in convicting a suspected party of a breach of this statute, because under the criminal procedure of every civilized country it devolves upon the prosecution to prove its case, and the same difficulty and embarrassment with respect to the sale of cigarettes likely devolved upon the police authorities of the State of Iowa. As an additional and easily executed provision of the criminal law, with the purpose in the Mississippi case to deter the sale of liquor, and with the purpose in the case at bar to deter the sale of cigarettes, there is inserted the provision for a penalty, in the one case called a penalty and amounting to $500, and in the other case called a "mulct tax" and amounting to $300. The Supreme Court of Mississippi disposed of the statute in the following language (p. 723):

> "It certainly requires no argument or citation of authorities to uphold the proposition that it is not within the power of the Legislature to provide for the infliction of a penalty, and its collection by summarily, without a judicial proceeding, fixing it upon the party to be charged. The constitutional provision by which it is declared that 'no person shall be deprived of life, liberty or property except by due process of law' would be practically abrogated if it should be held within legislative competency to commit to the hands of an executive officer the exercise of the power of seiz-

ing the property of the citizen to enforce an unadjudged penalty."

In the case just cited, the only parties to the litigation were parties alleged to be those personally guilty of the infraction of the law, and there was no provision for a lien on the real estate of innocent parties. If that decision was right, much more necessary it is that the Court declare that the statute in this case provides for a proceeding that does not constitute due process of law, when the effect of such proceeding is not only to attach and collect under the guise of a tax law a penalty against a criminal, but is also to collect from his landlord, however innocent, this same penalty.

When we leave the point of view of the owner of the property and come to that of the tenant and dealer in cigarettes, we come to the question of criminal procedure, and what constitutes due process of law in criminal procedure. This is so as a matter of substance without respect to whether the statute in question is called a tax statute or a criminal statute. It is called by the Supreme Court of Iowa a criminal statute, and, as an original question, a consideration of the statute thoroughly justifies that Court. By Sec. 5006, the sale of cigarettes has been made criminal. By Sec. 5007 the dealer is subject to this mulct tax of $300 per year, but it is expressly provided that his payment thereof shall not relieve him from the penalties and effect of the previously existing prohibition statute. What can this be, except the imposition of an additional penalty? If the dealer should be arrested and convicted for selling cigarettes under Section 5006, he would be subject to a fine of $50. Is there any reason why, based upon this conviction and the evidence which supported it, the county auditor could not assess him for one quarter's tax under Section 5007? He would, therefore, become liable to a payment of $75 additional. The $50 penalty collected under Section 5006 is collectible only after trial at which the accused is permitted to face his accusers, and in which the specific act must be proven; but the penalty of $75 collected under Section 5007 can be collected by the simple act of the county auditor, or three citizens, in entering

the name of the supposed offender as liable to the tax. This $75 penalty becomes absolutely fixed against him and his personal property and the real estate which he occupies, whether it belongs to him or not, and may be collected by distress, unless he applies for a remission within a fixed and short time, and thereby and thereupon becomes the plaintiff in the case, with the burden upon him of establishing his case, and with the right in the board to which he applies to consider as against him, not only specific acts, but the general reputation of his place of business.

It is not clear what does and what does not constitute due process of law in criminal procedure. In *Low* v. *Kansas* (*163 U. S., 81, 85*) this Court said that "whether the "mode of proceeding prescribed by this statute and fol- "lowed in this case was due process of law depends upon "the question whether it was in substantial accord with "the law in usage in England before the Declaration of "Independence, and in this country since it became a na- "tion in similar cases." The statement is ventured that nowhere and at no time has there been in common usage any system of criminal procedure which provides that a penalty shall be fixed by an executive officer, and that such penalty shall become absolute by a lapse of time, even without any actual notice to the person accused, and that upon application for remission it devolves upon the party accused to take the burden and prove his innocence.

There has been no more exhaustive discussion of this matter of due process of law in criminal proceedings than in the prevailing opinion of Mr. Justice Matthews and the dissenting opinion of Mr. Justice Harlan, in *Hurtado* v. *California* (*110 U. S., 516*). In that case there was considered a provision of the Constitution of California authorizing prosecution of felonies by information after examination and commitment by a magistrate, and without indictment by a grand jury. It is to be marked that preceding the information there was to be an examination and commitment by a judicial officer, a magistrate, and even after the information there was to be a trial in a court of law. With all of these provisions, Mr. Justice Harlan, believed that such provision did operate to de-

prive the citizen of his life, liberty or property without due process of law. The prevailing opinion is otherwise, but in it is an express recognition of the oft-quoted saying of Mr. Webster in the Dartmouth College case, that there must be a "proceeding which hears before it condemns," to constitute due process of law.

The Legislature of Iowa has recognized the vice in its liquor and cigarette "mulct tax" law, and by Chapter 95 of the Laws of 1902, has provided for notice before the levy of tax. This notice is short and summary, and it may be that it does not constitute "due process of law." But it was not provided for and not given in the case at bar. As the law then stood and under the procedure there followed there was a condemnation without a hearing, or a hearing without a notice.

JUNIUS PARKER,
Attorney for Plaintiffs in Error.

W. W. FULLER,
FRANK S. DUNSHEL,
JUNIUS PARKER.
Counsel.